

2014 WL 7365926 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Oregon.
Multnomah County

John MARRE, in his capacity as Personal Representative of the Estate of Jacqueline Marre, Plaintiff,

v.

ST. ANTHONY VILLAGE ASSOCIATES LIMITED PARTNERSHIP, an Oregon limited partnership,
St. Anthony Management, LLC, an Oregon limited liability company, Village Enterprises, an Oregon
nonprofit corporation, and Services for All Generations Enterprises, Inc., an Oregon nonprofit
corporation, Karen Marshall, an adult resident, and Jason Schaefer, an adult resident, Defendants.

No. 1303-03185.
August 6, 2014.

Plaintiff's Supplemental Memorandum in Support of Plaintiff's Motion to Compel Production of Documents

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Hon. Adrienne Nelson.

I. INTRODUCTION

On July 29, 2014, plaintiff his Motion to Compel Production Documents. Between the afternoon of Tuesday, July 29 and Sunday, August 3rd, defendants produced over 17,000 pages of discovery. The Court heard plaintiff's motion during the morning of August 4, 2014. During the hearing, plaintiff's counsel acknowledge that defendants had produced a significant amount discovery the filing of plaintiff's motion and the hearing and limited the outstanding discovery issues to the following:

- (1) All complaints of any kind regarding Howard Schumacher with all identifying/contact information of the persons making the complaints produced, including any HIPAA-protected information;
- (2) World Spark Records, including all information relating to loans World Spark received from defendants (in the total approximate amount of \$294,000), latest tax return information from World Spark, balance sheets and income statements, and all information relating to any compensation World Spark has paid Father Michael Maslowsky, the CEO of defendant Services for All Generations Enterprises, Inc. ("SAGE"); and
- (3) All documents relating to loans defendants have received from the Catholic Archdiocese (in the total approximate amount of \$6.27 million).

During the hearing, defendants agreed that plaintiff was entitled to documents relating to defendants' loans to World Spark and loans that defendants have received from the Archdiocese. Defendants objected to producing any World Spark records on the grounds that World Spark is not a party. Defendants indicated they had produced other complaint information relating to similar complaints about Howard (i.e. inappropriate or unwanted physical or sexual contact), but had not produced any HIPAA-protected information. Defendants objected to producing all documents relating to any complaints of any kind regarding Howard.

The Court made a ruling relating to the production of HIPAA-protected information, but plaintiff needs some clarification as to that ruling and will address the reasons why plaintiff needs unredacted, HIPAA-protected information relating to all complaints of Howard which defendants oppose.¹ The Court reserved ruling on the financial information and asked the parties to review the discovery that defendants recently produced and to send a letter to the Court advising the Court what remains outstanding. Plaintiff sent defendants an email on August 4, 2014 outlining the outstanding discovery. Supp Decl. of C. Dippel, ¶2, Ex. 1.

In response on Tuesday August 5th, defendants reiterated their objections as to the other complaints about Howard and the World Spark records and insisted on “formal briefing and hearing,” rather than “an informal letter exchange.” Supp Decl. of C. Dippel, ¶2, Ex. 1. Defendants did agree to produce all loan related information (including both loans to World Spark and loans received by defendants from the Archdiocese) that defendants possess with one exception -a loan made by the Archdiocese to Assumption Village. *Id.* One item that plaintiff has requested that plaintiff did not put in the motion to compel and did not have the opportunity to raise at argument addresses other government complaints. Defendants have instructed plaintiff to obtain such records directly from the Department of Human Services. This brings us to this Supplemental Brief.

II. ARGUMENT

A. Other Complaints About Howard Are Discoverable.

This is a case in which plaintiff has alleged claims for negligence, negligence *per se*, and statutory **elder abuse** against defendants for allowing Howard to sexually **abuse** Jackie, an incapacitated dementia patient. Plaintiff has also alleged punitive damages against defendants for their conduct in allowing the **abuse** to occur.

Plaintiff is entitled to know the extent to which others had complained about Howard's behavior for any reason. Such documents and information go to having a full and complete picture about the kind of person Howard was and what defendants knew about Howard's behavior and when they knew it.

Defendants have produced some records regarding another resident, “Iris,” who complained about Howard making unwanted physical contact. Supp Decl. of C. Dippel, ¶3. Plaintiff has requested all unredacted documents relating to Iris, and any others who complained about Howard. Defendants appear willing to produce documents relating to Ms that contain HIPAA protected information so long as the Court orders that production. Supp Decl. of C. Dippel, Supp Decl. of C. Dippel, Ex. 4.

With regards to all other requested documents, defendants object on the grounds that such information is either not relevant or evidence of other bad acts, and thus inadmissible. First, while trial is imminent, this is a discovery motion, so the standard is not whether the discovery sought will be admissible at trial. The standard is whether the requested information is reasonably calculated to lead to the discovery of admissible evidence. Second, discovery relating to other bad acts is discoverable for other purposes than simply proving character in conformity therewith and when the plaintiff has alleged a claim for punitive damages. [OEC 404\(3\)/ORS 40.170\(3\)](#).

[Rule 404\(3\)](#) states that “evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify or absence of mistake or accident.” [OEC 404\(3\)](#). Here, plaintiff requests this information to determine whether and when defendants knew that Howard had behavioral problems of any kind and their ongoing failure to address or correct such problems. Plaintiff can only glean that information from unredacted records indicating all complaints about Howard's behavior of any kind at any time for any reason.

Furthermore, plaintiff's claim for punitive damages is premised on defendants' deliberate indifference to the welfare of Jackie and others based on defendants' failure to correct Howard's behavioral issues. Such discovery is relevant and admissible. *Honstein v. Metro W. Ambulance Serv.*, 193 Or App 457, 468, 90 P3d 1030 (2004) (“When, as in this case, a plaintiff has sought punitive damages, whether the defendant has engaged in a pattern of similar misconduct is relevant to determining the propriety and amount of punitive damages.”).

B. World Spark Records Are Discoverable Because Defendants Have Loaned a Significant Amount of Money for “Non Profits,” and the Jury is Entitled to Know how World Spark Has Been Using Defendants' Money.

The point of discovery for punitive damages is to have a complete understanding of defendants' true financial picture. All of the defendants are related entities and are all run by a gentleman named Michael Maslowsky, a former Catholic priest. We know from the discovery that defendants have produced, that defendants appear to have commingled assets, funds, and liabilities.

Defendants claim non-profit status, but have somehow managed to make just shy of \$300,000 in loans to World Spark. Plaintiff is entitled to know the terms of those loans i.e. the conditions under which they were made, the repayment obligations, etc. Plaintiff is entitled to both those documents from the named defendants and whatever documents World Spark has. While not a defendant, World Spark is yet another entity controlled by Fr. Maslowsky. Because defendants have loaned such a significant sum of money, even though defendants are “non-profits,” plaintiff is entitled to see what that money is being used for. That kind of information can only come from World Spark's balance sheets and income statements.

Furthermore, plaintiff has requested that defendants produce records showing how much income/compensation World Spark has paid Fr. Maslowsky — information that can only come from World Spark's most-recent tax return. We have learned throughout the years that purported “non-profits” claim that they make no money, but somehow find a way to funnel significant income and money to their top executives, such as Fr. Maslowsky in this case. Plaintiff is entitled to know if the money that defendants have loaned World Spark is being used to compensate Fr. Maslowsky or however it's being used. Juries are entitled to know and understand how defendants use their financial resources in allocating an appropriate punitive damage award.

C. Loans to Assumption Village from the Archdiocese Are Also Relevant to Punitive Damages.

Defendants have agreed to produce their documents relating to loans they have received from the Archdiocese with one exception - a “2606 Archdiocese Loan,” to Assumption Village, in the approximate amount of \$926,500.

Assumption Village is another facility operated by defendant Services for All Generations Enterprises, Inc. (“SAGE”). All of these defendants, at least on the first review of defendants' financial records appear to have commingled debts, assets, and liabilities. Plaintiff is entitled to know if this loan to Assumption Village is really simply another loan to SAGE or any other defendant, whether the loan has any true repayment obligations, and whether or not any of the named defendants have access to this significant loan. If these are funds to which defendants have access and for which there is no repayment obligation, the jury is entitled to know about that information.

D. Plaintiff is Entitled to AH Complaints by the Government Regarding St. Anthony Village.

Plaintiff originally requested “all documents relating to any civil or administrative complaint, action or investigation initiated against the Facility or its owners or operators relating to the care of its residents.” Orig. Dippel Decl, Ex 4, RFP No. 32. On Sunday, plaintiff reiterated his request for all such complaints. Supp Decl. of C. Dippel, ¶5, Ex. 2. In response, defendants indicated they have no obligation to produce such reports because plaintiff can obtain those reports directly from the government. Supp Decl. of C. Dippel, ¶2, Ex. 1.

Plaintiff is attempting to obtain those records directly from the government. But even so, defendants should have copies of all APS/DHS reports of **abuse** at the facility from 2009 (the year Jackie moved into St. Anthony) to the present. The fact that responsive documents may be obtained from another source does not nullify defendants' obligation to produce those documents within defendants' possession, custody, or control. [ORCP 43](#).

If defendants have those records, defendants have to produce them. Such documents are directly relevant to the question of punitive damages. [Honstein, 193 Or App at 468](#) (“When, as in this case, a plaintiff has sought punitive damages, whether the defendant has engaged in a pattern of similar misconduct is relevant to determining the propriety and amount of punitive damages.”). Whether or not the defendants engage in a pattern and practice of **abusing** their vulnerable residents is directly relevant to the questions before the jury regarding an appropriate award of punitive damages.

E. With Regards to the Financial and HIPAA Documents, Defendants Were Advised that Plaintiff Needed The Documents on Friday, August 1 and Argued About The Documents During the Hearing.

While plaintiff was preparing this supplemental brief since defendants are insisting on “formal briefing and hearing,” plaintiff received counsel's letter August 6th letter to the Court stating that all of the issues discussed on Monday were not a part of plaintiff's motion to compel, requesting the Court rule, and suggesting that the trial judge hear any future motions to compel. Supp Decl. of C. Dippel, ¶6. All of the financial records requested were identified to defense counsel on Friday August 1. Supp Decl. of C. Dippel, ¶7, Ex. 2, Defense counsel responded by email on Saturday, August 2 regarding all of the outstanding issues relating to the World Spark documents and loan documents. Supp Decl. of C. Dippel, ¶8, Ex. 2.

Defense counsel appears to forget that at the time plaintiff filed his motion to compel, the only financial records defendants had produced were those relating to defendant Karen Marshall as of Tuesday, July 29. Supp Decl. of C. Dippel, ¶9. Defendants had produced no corporate financial records at the time. Supp Decl. of C. Dippel, ¶9. Therefore, at the time of filing, plaintiff needed all documents and was unable to identify any discrete missing documents because plaintiff did not have any corporate documents. Supp Decl. of C. Dippel, ¶10.

Thereafter, defendants began producing records and had produced approximately 7,000 pages by Friday August 1, 2014. Supp Decl. of C. Dippel, ¶11. Plaintiff worked night and day was still outstanding by Friday afternoon to confer and discuss what plaintiff would be asking the Court to order produced on Monday morning. Supp Decl. of C. Dippel, ¶12.

Around 2:00 p.m. Friday afternoon, plaintiffs counsel telephoned defense counsel to discuss the outstanding information. Supp Decl. of C. Dippel, ¶13. Defense counsel did not return that telephone call. Supp Decl. of C. Dippel, Ex. ¶13. Shortly thereafter, plaintiff emailed counsel outlining all of the missing records that plaintiff needed and the reasons for plaintiffs requests for the missing records. Supp Decl. of C. Dippel, ¶14, Ex. 2. Around 4:30 p.m. Saturday, August 2, defense counsel responded to plaintiff's email regarding the outstanding documents. Supp Decl. of C. Dippel, ¶15.

Plaintiff then, both before the hearing Monday morning and during the hearing, identified the need for all complaints relating to Howard's behavior/conduct, the World Spark records, and the loan information. Supp Decl. of C. Dippel, ¶16.

Plaintiff believes that with the exception of the APS/DHS documents, all other requested documents were identified as soon as practicable and were addressed with counsel and the Court both before and during the hearing Monday morning. The Court is well-informed of the issues and can rule on all of the documents requested. By filling this supplemental brief, defendants can file an opposition in response.

If the Court finds that these issues were not raised by plaintiff, plaintiff will defer to the Court regarding whether it should continue to handle these discovery issues or send these matters to the trial judge. However, during the trial judge's pre-trial conference with the parties on August 4, Judge Kantor informed the parties that after Monday, August 11, he is unavailable to rule on any other pre-trial matters until the first day of trial, August 18. Supp Decl. of C. Dippel.

Plaintiff needs these discovery related matters resolved this week given the August 18 trial date. If the Court agrees that defendants need to produce the outstanding documents (including the loan documents defendants have agreed to produce, but have not yet produced), plaintiff requests that the Court order defendants to produce all outstanding documents no later than the close of business Friday August 8, 2011, Plaintiff still needs time to review the documents and prepare for depositions on defendants' financial state. Dated this 6th day of August 2014,

FOLAWN ALTERMAN & RICHARDSON LLP

By <<signature>>

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Footnotes

- 1 Plaintiff believes that this information was specifically requested in plaintiffs motion to compel and at the hearing. Defendants disagree.